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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

ELBERT B. LINDSEY and
E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON,
Appellee.

No. 660

APPELLEE'S ANSWERING BRIEF

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ELBERT B. LINDSEY and E. R. LINDSEY, *Petitioners,*

vs.

STATE OF WASHINGTON, *Appellee.*

No. 660

APPELLEE'S ANSWERING BRIEF

In compliance with this Court's order entered in this matter on April 5th, 1937, this brief is limited to the question as to whether Chapter 114 of the Laws of Washington of 1935 is invalid as an *ex post facto* law. While the order reads "within the meaning of Article 1, Section 9, paragraph 3, of the Constitution," it will be assumed that the question is as to the validity of the Parole Board Act within the meaning of Article 1, Section 10, of the Constitution, as prayed for in petitioners' brief, and since the law in question is an enactment of the legislature of the State of Washington and not of Congress.

STATEMENT OF THE CASE

Petitioner E. R. Lindsey is an attorney-at-law (R. 26), and petitioner Elbert B. Lindsey is his twenty-five year old son, living with his parents. (R. 18 & 27). Both petitioners were convicted on September 14th, 1935 by a jury in the superior court of the State of Washington, the charge being the crime of grand larceny. The substance of the offense was a check (R. 4) drawn on the Spokane and Eastern Trust Company in the amount of $40.00. This check was written by E. R. Lindsey (R. 30) and cashed for the face amount by Elbert B. Lindsey. (R. 4). No funds of any nature were on deposit in the bank on which the check was drawn, nor had any credit arrangements been made for the same by the petitioners. (R. 14).

The trial was presided over by the Honorable Chas. H. Leavy, who resigned his office as superior court judge on December 1st, 1936. (R. 36; Stipulation). There are five superior court judges holding office in Spokane County, Washington. (Stipulation).

The offense was committed on April 15th, 1935. The Parole Board act of 1935 went into effect at midnight June 12th, 1935. The petitioners were sentenced by the trial judge on November 1st, 1935, to the penitentiary and reformatory respectively, under the provisions of the Parole Board act of 1935. (R. 50-52).

Petitioners appealed their conviction to the Supreme Court of the State of Washington, and the conviction was

affirmed by the Court, sitting *en banc*, at the June, 1936, term. *State v. Lindsey*, 187 Wash. 364, 61 Pac. (2d) 293.

In their appeal to the Washington State Supreme Court, petitioners attacked Chapter 114 of the Laws of 1935, which hereafter in this brief will be called the Parole Board act of 1935, as being invalid as in violation of Section 10 of Article 1 of the Constitution of the United States relating to *ex post facto* laws. (R. 63).

The Washington State Supreme Court, sitting *en banc*, held unanimously that the Parole Board act of 1935 did not violate the prohibition contained in the Federal Constitution regarding the passage of *ex post facto* laws, and that there was no error in the trial of the case and sustained the validity of the conviction. *State v. Lindsey*, 187 Wash. 364, 61 Pac. (2d) 293. (R. 87-92).

QUESTIONS INVOLVED

There are two questions of law for the determination of this Court in this case. The primary question is whether the Parole Board act of 1935 (Chapter 114 of the Laws of Washington of 1935) is in violation of the prohibition of the Federal Constitution as to *ex post facto* laws; and secondarily, whether the petitioners, having been properly and validly convicted of a felony, should be resentenced by another judge, other than the actual trial judge, of the superior court of Spokane County, Washington, under the general saving clause of the laws of Washington, Section 2006 of

Remington's Revised Statutes, in the event the Parole Board act should be held *ex post facto* as to their sentences.

ANALYSIS OF THE TWO LAWS

The Parole Board act of 1935 (Chapter 114 of the session laws of 1935) provides *in toto* as follows:

"CHAPTER 114

"BOARD OF PRISON, TERMS AND PAROLES.

"AN ACT relating to the provision for the adequate punishment of persons convicted of certain felonies, *their rehabilitation* while in confinement and the necessary supervision after their release to prevent recidivism, and defining the duties of the Board of Prison, Terms and Paroles with relation thereto; and repealing sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2 of Remington's Revised Statutes of Washington.

"Be it enacted by the Legislature of the State of Washington:

"SECTION 1. There is hereby created a board of prison, terms and paroles to administer the provisions of this act. The functions, powers, duties and limitations of this body and the qualifications and the tenure of office of its members will be as hereinafter set forth.

"SEC. 2. When a person is convicted of any felony, except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being an habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if

the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment: *Provided, however,* That in any case where such maximum term is fixed by the court the maximum term shall be fixed at not less than twenty (20) years.

"If the sentence of a person so convicted is not suspended by the court, it is hereby made the duty of the superintendent of the penitentiary and the superintendent of the reformatory to receive such a person, if committed to his respective institution, and to imprison him or her until released under the provisions of this act or through the action of the governor.

"After the admission of such convicted person to the penitentiary or reformatory, as the case may be, it shall be the duty of the board of prison, terms and paroles to obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning such convicted person's crime and any other information of which they may be possessed relative to such convicted person, and it shall be the duty of the sentencing judge and the prosecuting attorney to furnish the board of prison, terms and paroles with such information. It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance, what, in their judgment, should be the duration of such convicted person's imprisonment.

"Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her

confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court, where the law does not provide for a maximum term.

"When a convicted person appeals from his or her conviction and is at liberty on bond pending the determination of his or her appeal by the supreme court, credit on his or her sentence will begin from the date of the remittitur. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court.

"In case any convicted person undergoing sentence in the penitentiary or the reformatory commits any infractions of the rules and regulations of the penitentiary or reformatory, as the case may be, the board of prison, terms and paroles may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted, or the maximum fixed by the court. Such revocation and redetermination shall not be had except upon a hearing upon the question of the infraction of the rules charged to such convicted person before the board of prison, terms and paroles. At such hearing the convicted person, unless outside the walls of the penitentiary or the reformatory, as an escapee and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf.

"Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this section, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term.

"The following limitations will be placed on the board of prison, terms and paroles with regard to fixing the duration of confinement in certain cases, notwithstanding any provisions of the law specifying a lesser sentence, to-wit:

"(a) For a person not previously convicted of a felony but armed with a deadly weapon either at the time of the commission of his or her offense, or concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than five years.

"(b) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his or her offense, or a concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than seven and one-half (7½) years.

"The words 'deadly weapon' as used in this section are hereby defined to include any instrument known as a blackjack, sling shot, billy, sand club, sand bag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three (3) inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas: *Provided further*, That any inmate of the reformatory who is under the age of twenty-one (21) years at the time of commitment may be paroled by the board without regard to the limitations set forth in this section.

"The board of prison, terms and paroles shall require of every able-bodied convicted person imprisoned in the penitentiary or the reformatory as many hours of faithful labor in each and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the institution in which he or she is confined.

"Every prisoner who has a favorable record of conduct at the penitentiary or the reformatory, as the case may be, or the laws of the state, and who performs in a faithful, diligent, industrious, orderly and peaceable manner the work, duties and tasks assigned to him to the satisfaction of the superintendent of the pentitentiary or the reformatory, as the case may be, and in

whose behalf the superintendent of the penitentiary or reformatory shall file a report certifying that his or her conduct and work have been meritorious and recommending allowance of time credits to him or her, shall upon, but not until, the adoption of such recommendation by the board of prison, terms and paroles, be allowed time credit reductions from the term of imprisonment fixed by the board of prison, terms and paroles.

"(c) Any person who shall have been convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder such person's confinement shall be fixed at not less than five (5) years.

"SEC. 3. To assist it in fixing the duration of a convicted person's term of confinement, prescribing treatment for such person while in confinement and supervising and regulating his or her activities while on parole, it shall not only be the duty of the board of prison, terms and paroles to thoroughly inform itself as to the facts of such convicted person's crime but also to inform itself as thoroughly as possible as to such convict as a personality. The board of prison, terms and paroles must, therefore, adopt and apply an effective technique of investigation to develop information for that purpose.

"SEC. 4. The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him

or her by the board of prison, terms and paroles, less time credits for good behavior and diligence in work as provided for by this board: *Provided*, that in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

"The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.

"The board of prison, terms and paroles may impose as a condition of a parole granted a convicted person that all or a portion of his or her credits earned, or to be earned, shall be forfeited in the event that such convicted person shall break his or her parole or violate any law of the state, or rule or regulation of the penitentiary or the reformatory, as the case may be, or the board of prison, terms and paroles.

"Such forfeiture of credits shall not be had except upon a hearing upon the question of such violation and upon the findings of the board of prison, terms and paroles that such convicted person was guilty thereof, which adjudication shall be final. At such hearing such convicted person, unless outside the walls of the penitentiary or the reformatory, as the case may be, as an escapee and a fugitive from justice, shall be present and entitled to be heard and present evidence and witnesses in his or her behalf.

"The written order of the board of prison, terms and paroles, bearing the seal of that body, shall be sufficient warrant for all officers named in this section to take into custody any convicted person who may be on parole and retain such person in his custody until arrangements can be made by the board of prison, terms and paroles for his or her return to the institution from which he or she was paroled.

"It is hereby made the duty of all chiefs of police, marshals of cities and villages, sheriffs of counties and all police, prison and peace officers and constables to execute any such order in the same manner as any ordinary criminal process.

"The board of prison, terms and paroles shall cause a complete record to be kept of every prisoner released on parole. Such records shall be organized in accordance with the most modern methods of filing and indexing so that there will be always immediately available complete information about each such prisoner. The board of prison, terms and paroles may make rules as to the privacy of such records and their use by others than the board of prison, terms and paroles and its staff.

"The superintendent of the penitentiary and the reformatory and all officers and employees thereof and all other public officials shall at all times cooperate with the board of prison, terms and paroles, and shall furnish to such board, its officers and employees such information as may be necessary to enable it to perform its functions, and such superintendents and other employees shall at all times give the members of such board, its officers and employees free access to all prisoners confined in the penal institutions of the state.

"It is understood that no provision in this act will limit or circumscribe the powers of the governor of the state to commute the sentence of, or grant a pardon to, any convicted person, and the governor is hereby authorized to cancel and revoke the parole granted to any convicted person by the board of prison, terms and paroles. The written order of the governor of the state cancelling or revoking such parole shall have the same force and effect and be executed in like manner as an order of the board of prison, terms and paroles.

"From and after the suspension, cancellation or revocation of the parole of any convicted person and

until his return to custody he shall be deemed an escapee and a fugitive from justice and no part of the time during which he is an escapee and fugitive from justice shall be a part of his term.

"The board of prison, terms and paroles shall make all necessary rules and regulations to carry out the provisions of this act not inconsistent therewith, and may provide the forms of all documents necessary therefor.

"The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or the reformatory, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof.

"SEC. 5. Whenever in its judgment the best interests of the state or the welfare of any prisoner confined in any penal institution will be better served by his or her transfer to another institution the board of prison, terms and paroles is authorized to order and effect such transfer.

"The board of prison, terms and paroles shall direct the transportation of convicted persons to the penitentiary and the reformatory and is hereby vested with authority to employ necessary persons for such purpose and to utilize the services of such persons for the supervision of convicted persons on parole wherever possible.

"SEC. 6. Whenever the sentence of a convicted person to the penitentiary or the reformatory is suspended by the court under authority of section 2280 of Remington's Compiled Statutes, the board of prison, terms and paroles will assume and undertake the supervision of such persons during the period of such suspension or until such sentence is terminated by the governor. The board of prison, terms and paroles will promulgate rules and regulations for the conduct of

such person during the time the suspension of his or her sentence is in effect.

"Whenever, in the opinion of the board of prison, terms and paroles, the suspension granted by the court under the provisions of section 2281 of Remington's Compiled Statutes should be revoked, the said board of prison, terms and paroles shall notify both the prosecuting attorney and the presiding judge of the superior court for the county wherein the sentence was suspended, to the end that appropriate action may be taken in the premises. If an order of the court is made revoking the suspension of a sentence, the convicted person shall be forthwith admitted to the penitentiary or the reformatory, as the case may be, and the board of prison, terms and paroles will thereafter fix the duration of such person's confinement in the manner provided for by section 2 of this act.

"SEC. 7. It shall be the duty of the board of prison, terms and paroles, when requested by the governor, to pass on the representations made in support of applications for pardons or the restoration of civil rights for convicted persons and to make recommendations thereon to the governor.

"It will also be the duty of the board of prison, terms and paroles to exercise supervision over such convicted persons as have been conditionally pardoned by the governor, to the end that such persons shall faithfully comply with the conditions of such pardons.

"SEC. 8. The board of prison, terms and paroles will consist of a chairman and two other members, each of whom shall be appointed by the governor by and with the advice and consent of the senate. The terms of the first members shall expire as follows: one member, April 15, 1937; one member, April 15, 1939; and one member April 15, 1941. Thereafter, any person appointed a member of the board shall hold office for a term of six years. Vacancies in the membership of the board shall be filled in the same manner in which the

original appointments are made. In the event of the inability of any member to act, the governor shall appoint some competent person to act in his stead during the continuance of such disability. The governor in first appointing such members shall designate one of them to serve as chairman during his term of office. The board shall elect his successor from among its members. Any member of the board may be removed by the governor for cause after an opportunity to be heard.

"The members of the board of prison, terms and paroles and its officers and employees shall not engage in any other business or profession nor hold any other public office; nor shall they, at the time of appointment nor during their incumbency of office, serve as the representative of any political party on an executive committee or other governing body thereof, nor as an executive officer or employee of any political committee or association.

"The chairman of the board shall receive an annual salary not to exceed four thousand dollars ($4000) and the other two members of the board shall receive an annual salary not to exceed thirty-five hundred dollars ($3500), and in addition thereto, their necessary expenses actually incurred in the discharge of their official duties.

"The board shall have the power to employ, and to fix, with the approval of the governor, the compensation of and to prescribe the duties of a secretary and such officers, employees and assistants as may be necessary, and to provide necessary quarters, supplies and equipment.

"The board of prison, terms and paroles shall meet at the penitentiary and the reformatory at such times as it may be necessary for a full and complete study of the cases of all convicted persons whose terms of imprisonment are to be determined by it or whose applications for parole come before it. Other times and

places of meeting may also be fixed by the board. A majority of the board shall constitute a quorum for the transaction of business and no order of the board shall be valid unless concurred in by at least two (2) of its members.

"The board of prison, terms and paroles shall transmit to the governor, for submission to the legislature, biennially, or as often as the governor may require it, a report of its work, in which shall be given the number of prisoners whose terms of imprisonment have been fixed by it and the number who have been released on parole, and such other information as may be relevant. It shall be the duty of the superintendent of the different institutions to provide suitable quarters for the board and assistants while in the charge of their duties.

"SEC. 9. That sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2 of Remington's Revised Statutes of Washington be and the same are hereby repealed.

"Passed the House March 8, 1935.

"Passed the Senate March 6, 1935.

"Approved by the Governor March 20, 1935."

A reading of the act of 1935 clearly indicates that it is a new indeterminate sentence law, the administration of which is left to a board of prison terms and paroles. As will be pointed out later in this brief, indeterminate sentence statutes have uniformly been held to be constitutional and not *ex post facto*, nor to be a usurpation of judicial powers by a ministerial body, as contended by petitioners in their brief to this Court.

Referring now to the laws in existence at the time of

the offense, which were repealed by the Parole Board act of 1935, it is revealed that the substantive law governing this offense, to-wit: grand larceny, Remington's Revised Statutes 2601, remains unaltered by the act of 1935. Likewise the penalty statute relating to the punishment for grand larceny, Remington's Revised Statutes 2605, provides that any person committing an act under Remington's Revised Statutes 2601 "shall be guilty of grand larceny and be punishment by imprisonment in the state penitentiary for not more than fifteen years." As was pointed out in this brief *supra*, the sentence of the trial judge was for "not more than fifteen years." It is thus seen that the maximum sentence imposed by the trial judge under the provisions of the Parole Board act of 1935 was in the identical language of the statute in existence at the time of the offense and remaining as such at all times since.

It will be agreed by both parties to this issue, that the test of the *ex post facto* nature of the act of 1935 is to be measured by the yardstick issued by this Court in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648.

> "Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed."

Much attention is directed to Remington's Revised Statutes 2281, and 2195 the indeterminate sentence statute of which the act of 1935 is a substitution and which was repealed by the act of 1935. Under the terms of Remington's Revised Statutes 2281 and 2195, petitioners must show that

their punishment would be less than that imposed under the Parole Board act of 1935. Remington's Revised Statutes 2281 reads as follows:

> "2281. Indeterminate sentences. Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington state reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

A comparison of the above repealed statute with the Parole Board act of 1935 discloses a most vital point in the consideration of this case, namely that there is no change in the punishment, nor does the later act inflict any greater punishment than the law annexed to the crime when committed, but it is in effect only a transfer of a discretionary power from the court to a board of prison terms and paroles; or, in other words, a mere change in the mode of procedure for carrying out of the sentence or actual period of confinement of one convicted of crime.

As to the maximum term of imprisonment, Remington's Revised Statutes 2281 provides that where no fixed period of confinement is imposed by specific statute, the term shall

be that prescribed by law for the offense of which such person shall be convicted. As in the present case, that of grand larceny, it prescribes not more than fifteen years. As has been pointed out, that was the identical maximum sentence imposed by the court upon these petitioners in passing sentence under the Parole Board act of 1935.

There has been no change in the substantive law. No court can indulge in the presumption that the court would in any given case impose a lesser maximum term than that prescribed by the substantive law.

Examining the provision as to the minimum term as declared under Remington's Revised Statutes 2281, as it would be applied to the offense of grand larceny, the old law provides that: "Where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years."

Under the substantive law of Remington's Revised Statutes 2605, relating to punishment for grand larceny, no minimum is fixed. Hence the court by general statute is required to impose a minimum of at least six months.

Under the powers granted the parole board under the act of 1935, it is possible that the persons convicted could be released from the penal institution after serving one day. There is not a scintilla of evidence in this record to indicate that these petitioners have ever been committed up to this time to any penal institution for any fixed or defin-

ite period, and, under the mandate of the statute under which they claim they have a right to be sentenced, the court is required to order them imprisoned for not less than six months. Most certainly then they are not entitled to ask relief of this Court or any other court until they have affirmatively shown that they have been confined for at least the minimum for which they must be confined under all the statutes both new and old or that the parole board has fixed a longer minimum.

This brings us to an analysis of the situation of the petitioners as to their duration of confinement at the expiration of the mandatory six months if sentenced under the old law. In 1909 the legislature of the State of Washington enacted a statute investing a state board of control with the power to determine the period of imprisonment, being Remington's Revised Statutes 2282, which reads as follows:

> "2282. The board having control to determine period of imprisonment. The state board of control, acting in conjunction with the warden of the state penitentiary, or the board of managers of the Washington state reformatory, acting in conjunction with the superintendent of such reformatory, as the case may be, *may* at any time after the expiration of the minimum term of imprisonment for which such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case."

This is one of the statutes repealed by the Parole Board act of 1935.

It is readily seen that under the old law, the indeterminate sentence law, Remington's Revised Statues 2281, a person convicted of crime could not demand as a matter of right or guaranty that he be released upon serving the minimum sentence. In other words, under the old law, it was discretionary with the board of control as to whether a prisoner should be released after serving his minimum sentence, and it was fully within the power of this board to require that the maximum sentence be served before release.

In 1921 a parole board of three members was created by the Washington state legislature, which supplanted the old board of control, being Remington's Revised Statutes 10803:

> "The governor shall from time to time appoint parole boards of three members, who shall respectively exercise all the powers and perform all the duties relating to the parole of prisoners from the state penitentiary and the Washington state reformatory, now vested in, and required to be performed by, the state board of control and the board of managers of the reformatory."

It necessarily follows that it was likewise within the sound discretion of the parole board created by the act of 1921 as to whether a prisoner should be released after serving the minimum term fixed by the trial judge. Again a prisoner might be compelled to serve the maximum term.

When the state legislature passed the act of 1935, it could not, therefore, have invested the parole board with any greater powers to inflict a greater minimum term of

confinement than was granted to the old boards which were in existence at the time the offense was committed by these petitioners. Again it is asserted that the act of 1935 is only a substitution of discretionary powers granted to a trial judge over to a board of prison terms and paroles.

The constitutionality of these earlier parole board acts passed by the state legislature was confirmed by the Supreme Court of the State of Washington in *State v. Feilen*, 70 Wash. 65, 41 L.R.A. (N.S.) 418.

A careful analysis and comparison of the Parole Board act of 1935 with the statutes providing for the boards in existence at the time the offense was committed leads to the conclusions that no greater punishment is inflicted, nor does the new act in any way inure to the disadvantage of the petitioners, but on the contrary is to their advantage and is in accord with the trend of modern decisions looking to, in the words of the act of 1935, the "rehabilitation" of the persons sentenced to penal institutions.

In the Parole Board act of 1935, the general subject of the act is the manner of carrying into effect the punishment, provided by law, of persons convicted of certain offenses. The principal purpose of the act is to provide a system of parole.

ARGUMENT

The courts are met at the threshold of any discussion as to the constitutionality of a legislative act with the rule of

construction familiar to this Court, that every presumption is indulged in that sustains the constitutionality of the act. This Court from the time of John Marshall has adhered to this rule of construction. *Malloy v. So. Carolina*, 237 U. S. 180; Cooley Constitutional Limitations, 7th Ed. 254.

> "The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, as they must be deemed to have acted with integrity and with a just desire to keep within the restrictions laid by the constitution upon their actions, have adjudged that it is so."

12 C. J. 791, Constitutional Law:

> "A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature, and the burden of showing that it is unconstitutional is on the party asserting it."

> "It is presumed that a state legislature will not violate the federal constiution and this presumption is very strong, so much so that it is the duty of the court, where an act of a state legislature is assailed as being in violation of the federal constitution, to make every reasonable presumption against such violation."

This Court so held in *McCabe v. Atchison*, 186 Fed. 966; also in 235 U. S. 151.

The petitioners in their brief have attacked the constitutionality of the Parole Board act of 1935 principally upon the ground that it takes a statutory right of the court to fix the maximum and minimum sentence from the court and places it in a ministerial board. They rely principally in their argument on the case of *Ex Parte Lee*, a California case found in 171 Pac. 958. A reading of that case discloses

that the indeterminate sentence law passed in California did away with the system of credits for good conduct, which was not done by the legislature of Washington in passing the Parole Board act of 1935. Because of that feature the California act was held *ex post facto* and the petitioner was remanded back to the superior court for resentence. A full reading of this California case, depended upon by these petitioners, completely refutes their argument of usurpation of judicial power by a ministerial board. We quote,

> "• • • It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. *State v. Perkins*, 143 Iowa 55, 60, 120 N. W. 62, 21 L. R. A. (N. S.) 931, 20 Ann. Cas. 1217, and cases there cited; *State v. Tyree*, 70 Kan. 203, 209, 78 Pac. 525, 3 Ann. Cas. 1020; *Woods v. State*, 130 Tenn. 100, 113 169 S. W. 558, L.R.A. 1915F, 531; *Commonwealth v. Kalck*, 239 Pa. 533, 542, 87 Atl. 61, and cases there cited. • • • The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character, and properly exercised by an administrative body."
>
> • • • • •
>
> "The Supreme Court of the state of Tennessee in answering the contention that the indeterminate sentence law delegated the legislative authority to the board of prison directors said:
>
> "'The powers conferred are in no sense a delegation of legislative authority. The act does not attempt

to confer on the board the power to fix the punishment that any given crime shall bear. The act itself, in effect, becomes a part of every judgment, and the board only one of a series of agencies for the execution of the judgment. The Legislature declared by previous statutes that the period of confinement, aside from certain crimes not pertinent here, should lie between a maximum and a minimum; the ascertainment of the exact period between the two being left for the jury in each case. Under the present statute the punishment is fixed at a maximum, subject to diminution below that number of years, after the minimum shall have been served, through the operation of a certain discretion vested in the board of prison commissioners. * * * It is impossible to see any element of legislation in the power so to be exercised by the commissioners. There is a striking similarity between the powers here conferred on the board and the authority granted to prison officials under good time statutes, which have generally been held constitutional. It is true the Legislature of our state fixes the terms on which the prisoner is entitled to good time, and how much good time shall be allowed each year (Acts of 1897, c. 125, sec. 24), and it has been held to be a right which can not be denied him; but still there may be a deduction from good time earned for subsequent bad conduct, and there is a discretion in the officers, depending on their judgment as to whether he has obeyed the rules of the prison.'"

The Supreme Court of the State of Washington again passed on the precise question at bar in a decision on April 14th, 1937, in the case of *State of Washington v. John C. Mulcare et al*, reported in Vol. 89 Wash. Dec. 547. In determining the constitutionality of a state statute, namely the Parole Board act of 1935, the highest court of the state answers the principal contention of the petitioners in this case. We quote from this current decision:

"Appellants' contention is that the 1935 act is unconstitutional in that it deprives the court of a part of its judicial powers, contrary to Art. IV, Sec. 1, of the constitution, which vests the judicial power of the state in the courts. The argument is that the fixing of the term of imprisonment is a judicial power which can not be conferred upon, nor exercised by, an administrative body such as the board of prison, terms and paroles; further, that the act demotes the judiciary into a mere advisory personality and elevates a lay board to the position of a judicial tribunal.

"Acts generally similar to the 1935 act above mentioned have been enacted in many states of the Union, and have successfully withstood attacks based upon various grounds, including those suggested by the appellants here.

"The legislative authority of the state is vested in the legislature, subject to the initiative and referendum. Constitution, Art. II, Sec. 1, as amended by Amendment 7. Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment. *State v. Duff*, 144 Iowa 142, 122 N. W. 829, 24 L.R.A. (N.S.) 625; 138 Am. St. 269; *Cave v. Haynes*, 268 N. W. (Iowa) 39; *Mutart v. Pratt*, 51 Utah 246, 170 Pac. 67; 8 R.C.L. 257, Sec. 264.

"It is the function of the judicial branch of the government to determine the guilt of persons charged with crimes and to impose the sentence provided by law for the crime of which a particular individual has been found guilty. But the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the legislature. *In re Lee*, 177 Cal. 690, 171 Pac. 958; *People v. Hale*, 64 Cal. App.

523, 222 Pac. 148, *Mutart v. Pratt*, 51 Utah 246, 170 Pac. 67; *State ex rel. Kelly v. Wolfer*, 119 Minn. 368, 138 N. W. 315, Ann. Cas. 1914A, 1248, 42 L.R.A. (N.S.) 978; *State v. Dugan*, 84 N. J. L. 603, 89 Atl. 691, 694; *Johnson v. State*, 169 Ga. 814, 152 S. E. 76.

"Since the legislature has the power to fix the term of imprisonment, and inasmuch as the courts and all other proper officials are required to carry out the legislative mandate to the extent of their authority, there is no encroachment upon, nor assumption of, judicial power by the board when it follows the rules and methods prescribed by the 1935 act, nor does that act violate any constitutional right of the appellants.

" 'Inasmuch as a legislature may fix a definite and certain term of imprisonment for any particular crime, and this without placing any discretion in the hands of the court whose duty it is to carry out the legislative mandate, it must necessarily follow that an indeterminate sentence statute violates no constitutional right of the defendant, and violates no constitutional guaranty of the state in providing that a prisoner convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime.' 8 R.C.L. 261, Sec. 270.

"We hold that the act above referred to is not unconstitutional."

A study of all the authorities reveals that the decided weight of authority and text book writers supports the validity of such enactments.

Quoting from Wharton's Criminal Law, Volume 1, Section 44; R. A. 1915 F. 531:

"The indeterminate sentence in parole laws have in recent years greatly expanded earlier methods of relieving those convicted from set penalties fixed for

crime. Usually further provision is made by law that the convict may, after serving the minimum sentence, be released on parole and let go at large, under such conditions as the court or a board or other power may prescribe, having regard to the reformation of the prisoner and the welfare of society. Authority to parole is not a judicial power nor a delegation of legislative authority."

Rooney v. North Dakota, 196 U. S. 180.

In *Marion v. State*, 29 N. W. 911, it was held to be within the power of the legislature to change the procedure or *manner of enforcing the punishment* after the commission of the offense, and such law would not be *ex post facto*. The change made between time of the crime and trial was that the right to fix the punishment was transferred from the jury to the judge.

Might it not equally be transferred from the judge to a parole board?

Citing Cooley on Constitutional Limitation at p. 331.
See also *People v. Joyce*, 92 N. E. 607, *infra*.
I Bishop on Criminal Procedure, Sec. 115:

"It is a doctrine extending through every department of the law, that rights, when vested in individuals, are unchangeable, while remedies by which those rights are enforced may be varied from time to time at the pleasure of the legislature."

Indeterminate Punishment, 8 R.C.L. Sec. 270, Criminal Law:

"Inasmuch as a legislature may fix a definite and certain term of imprisonment for any particular crime and this without placing any discretion in the hands of

the court whose duty it is to carry out the legislative mandate, it must necessarily follow that an indeterminate sentence statute violates no constitutional right of the defendant and violates no constitutional guaranty of the state in providing that a prisoner convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime. Powers granted under such an act to a board of pardons *are not judicial in character* but are matters of prison discipline and are intended to be exercised for the benefit of offenders who are in prison. Neither is the provision of such an act by which the court sentences the accused to the maximum term fixed by the statute an infliction of punishment out of proportion to the offense. An indeterminate sentence law which does not add to or increase the punishment of an offense beyond that existing at the time of its commission is not *ex post facto*, though the crime was committed before the passage of the act. A different method of fixing the amount of punishment between certain limits, which merely mitigates the punishment, does not add to or increase it."

In *People v. Joyce*, 92 N. E. 607, 20 Ann. Cas. 472, the Illinois parole board act was attacked on the ground that the act conferred judicial powers on the board of pardons and so was unconstitutional. The Supreme Court of Illinois held that judicial power in a constitutional sense is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law.

Administrative and executive officers are often called upon, in the performance of their duties, to exercise judgment and discretion, to investigate, deliberate and decide, and yet it is held they do not exercise judicial power within the meaning of the constitutional provision.

The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilty, then to pronounce the punishment or penalty prescribed by law. The execution of the sentence belongs to a different department of the government. The manner of executing the sentence and the mitigation of punishment are determined by the legislative department and what the legislature has determined in that regard must be put in force and effect by administrative officers.

> "The right to have the court fix the amount of punishment is no more a fundamental right than it is to have the jury fix it."

The Indiana indeterminate sentence law was attacked as *ex post facto* in *Davis v. State*, 51 N. E. 928, the facts being, as in the case at bar, that the offense was committed before the passage of the act. Paralleling the instant case, the situation was that the limits of punishment were the same under both laws. The Supreme Court of Indiana held that any change which "only prescribes a different method of fixing the amount of punishment within those limits" is not *ex post facto*. On the facts and reasoning of this leading cast from the Indiana Supreme Court, can be readily found the basis of decision in the case at bar.

The Indiana Supreme Court in *Miller v. State*, 59 N. E. 894, answering a claim of usurpation of judicial power, has declared that:

> "If the statute fixing the imprisonment is not in

> violation of said section of the constitution (cruel and inhuman punishment), then any punishment assessed by the court or jury within the limits fixed by the statute (the indeterminate sentence act) can not be adjudged excessive by this court, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power but a legislative power, controlled only by the provisions of the constitution." Citing *People v. Illinois State Reformatory*, 36 N. E. 78.

This latter case is much cited by the authorities and was an instance where only a maximum term was imposed by the court, exactly as was done in the case at bar, and the actual period of confinement was placed in the discretion of the board of managers. The Illinois court held that all violators of the criminal law have no constitutional right to have the quantity of his punishment fixed by a jury. Quoting Blackstone, in his two Commentaries, Book 4, Sec. 12:

> "The quantity of punishment can never be absolutely determined by any standing, invariable rule, but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society and such as appear to be best calculated to answer the end of prevention against future offenses."

This Court has held in *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, that the prescribing of different modes of procedure and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition against *ex post facto* law.

The same conclusion was arrived at by the Supreme Court of Pennsylvania in *Commonwealth v. Kalck*, 87 Atl. 61, when it followed this Court's ruling in the *Duncan* case, *supra*. In the *Kalck* case the defendant was convicted of a felony and before sentence was imposed an indeterminate sentence law was passed and went into effect. Kalck claimed the new law to be *ex post facto* because it increased the punishment. The substantive law prescribing punishments and penalties remained the same before and after the passage of the new law, just as it has in the present case. The reasoning of Judge Elkin appeals to us as extremely good logic and we quote from his opinion as follows:

> "• • • The argument is that the crime of which appellant stands convicted was committed while the Act of 1909 was in force, and that this act fixed the punishment for murder of the second degree at from 5 to 20 years; that is, under an indeterminate sentence the maximum was 20 years and the minimum not more than 5 years. The act of 1911 changed this provision of the Act of 1909 by giving to the trial court the power to fix the minimum sentence at any number of years within the maximum limit, and this is the matter about which appellant complains. Under the Act of 1909 her minimum sentence would have been 5 years, while under the Act of 1911 it was fixed by the court at 15 years, and in this way it is said the punishment of appellant has been increased.
>
> "This position overlooks the fact that neither the Act of 1909 nor the Act of 1911 undertook to fix the punishment for any crime, nor did these acts repeal the laws then in existence, prescribing penalties and punishments for different crimes. The punishment for murder of the second degree is fixed by the Act of April 14, 1893 (P. L. 17), which amended the Act of March

31, 1860 (P. L. 382). The Act of 1893 provides that: 'Every person duly convicted of the crime of murder of the second degree, shall, for the first offense, be sentenced to undergo an imprisonment, by separate or solitary confinement, not exceeding twenty years, and for the second offense for the period of his natural life.' This is the act, and the only act, in force at the time the crime in the present case was committed, fixing the punishment for second degree murder. The Acts of 1909 and 1911 did not repeal the Act of 1893. The intention not to repeal acts prescribing penalties and punishments clearly appears in the title and all through the enacting clauses of the Acts of 1909 and 1911. These acts undertook to regulate, not the law which fixed the punishments, but the sentencing of convicts, and the method of releasing them on parole. The purpose of these acts was to regulate the control and discipline of persons convicted of crimes with a view to their reformation. Under these acts the courts can sentence in such manner as to give the offender an opportunity to secure a release on parole upon certain conditions within the control of the prison authorities when recommended by the board of pardons and approved by the Governor. But nowhere in the Acts of 1909 and 1911 did the legislature undertake to prescribe penalties and punishments for crimes, as to which the law remained the same after as before the passage of these acts. • • • We may safely conclude, therefore, under the well-settled rule, that, the statutory plnishment having been neither changed nor increased by the Act of 1911, appellant can not escape punishment on the ground of this act being an ex post facto law as to her.

"This view is in accord with the trend of decision interpreting indeterminate sentence laws in many other jurisdictions, in which it was held that a sentence for an indefinite term must be deemed a sentence for the maximum term prescribed by law as a punishment for the offense committed. • • •

"(4) A statute which mitigates the penalty is not objectionable on the ground of being an ex post facto

law, although passed after the crime was committed. *Com. v. Wyman*, 66 Mass. (12 Cush.) 237; *Com. v. Gardner*, 77 Mass. (11 Gray) 438; *Dolan v. Thomas*, 94 Mass. (12 Allen) 421.

"(5) So, too, statutes which relate to procedure or penal administration, or prison discipline, are not to be considered ex post facto, even though the effect may be to enhance the severity of the punishment. *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; *Cook v. U. S.*, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906; *Gut v. State*, 76 U. S. 35, 19 L. Ed. 573; *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; *People v. Mortimer*, 46 Cal. 114. Indeed, it may be stated as a general rule that no one has a right to insist that particular remedies shall remain unchanged, or that courts and their jurisdiction and the proceedings in them shall continue unaltered, or that there shall be no departure from established methods in prison discipline or penal administration. Retrospective legislation relating to crimes and punishments may or may not be declared unconstitutional on the ground of being ex post facto. The question in each case is whether it will increase the punishment or deprive a party of substantial rights to which he was entitled under the law as it stood at the time the offense was committed. If the situation is not altered or changed to the disadvantage of the complaining party, the law, even if passed after the offense was committed, is not ex post facto as to him. We are not familiar with any decision, and none has been called to our attention, declaring an act unconstitutional which related to prison discipline, or to penal administration, intended to benefit prisoners, on the ground of its being an ex post facto law, even if such an act was retrospective in its operation.

"In the present case the maximum punishment for murder of the second degree under the Act of 1893 was an imprisonment of 20 years, and nothing contained in the Act of 1911 increased or aggravated the crime. The provisions of this act were intended to benefit convicted persons and to mitigate the severity of their pun-

ishment as prescribed by law. This act represents the humanitarian view of those most competent to speak on the question of the proper treatment of criminals. It is believed to be wholesome legislation, and we can see no reason why courts should be astute in sustaining technical objections intended to strike it down."

12 C. J. 1103, Constitutional Law:

"Statutes that relate to parole administration or prison discipline in the sense that they merely provide for the enforcement of the sentences of convicted persons are not ex post facto as to offenses previously committed."

"Where a law relates to matters of procedure merely, and does not deprive the accused of any substantial protection, it is not ex post facto."

The constitutionality of an indeterminate sentence imposed was sustained by the Supreme Court of Massachusetts in *Commonwealth v. Brown*, 45 N. E. 1, and held to apply to all such sentences imposed after the passage of the act.

12 C. J. 1102, Constitutional Law:

"Indeterminate sentence laws providing that instead of sentence for a definite time, the sentence shall be for not less than a certain minimum nor more than a certain maximum, the length of the term between such limits to depend on the behavior of the prisoner, are not unconstitutional as such, even as applied to past offenses."

People v. Stratton, 28 Pac. (2d) 695.

State v. Mulcar & Eagen, 89 Wash. Dec. 547.

In the event that this court should hold the Parole Board act of 1935 to be *ex post facto* as to these petitioners

but without waiving our argument in any sense as to the validity of the Parole Board Act of 1935, we respectfully submit that these petitioners should be remanded back to the superior court of Spokane County for resentence by reason of the general saving clause, Remington's Revised Statutes 2006, which reads as follows:

> "2006. Repeal and amendment of criminal statutes—Saving clause presumed. No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be awended or repealed, all offenses committed, or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act; and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

The validity of this general saving clause statute has been sustained in *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. 897; *State v. Ames*, 47 Wash. 328, 92 Pac. 137; *State v. Hanover*, 55 Wash. 403, 104 Pac. 624, 107 Pac. 388.

That this is the proper procedure has been held by the Supreme Court of the State of Washington in the cases of *In re Blystone*, 75 Wash. 286, 134 Pac. 827, and *State v. Nicholes*, 135 Wash. 333, 237 Pac. 706.

This Court has followed this procedure in compliance with Section 461, Title 28, U.S.C.A., and in the case of *Bryant v. U. S.*, 214 Fed. 51, held:

> "The defects in the first sentence, if any, did not inhere in the trial or verdict and therefore it appears Bryant is guilty and was properly convicted."

Quoting from another decision of this Court, *Ex Parte Spencer*, 228 U. S. 652, 57 L. Ed. 1010:

> "When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be excessive or illegal, it may be modified or changed, and complete justice done as we have said, to the prisoner, and the penalties of the law satisfied as well."

And further quoting from *Beale v. Commonwealth*, 25 Pa. 11, under section 761 R. S.:

> "The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctions such a rule it would fail to perform the chief duty for which it was established."

A like disposition is found in a case on all fours on the facts with the case at bar by District Judge Cavanah on November 21, 1936, in the case of *Andrus v. McCauley et al*,

No. L. 1421, in the United States District Court for the Eastern District of Washington, Southern Division, at Walla Walla, Washington. This case is cited by petitioners in their brief.

It may be of assistance in this matter to inspect the application of the Federal Saving Clause as it has been applied by the Federal courts. Section 13 of the Federal Revised Statutes, Sec. 29 of Title 1, U.S.C.A., after which was modeled the general saving clause Remington's Revised Statutes 2006 for the State of Washington, provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

In *U. C. v. Reisinger*, 128 U. S. 481, this court held the general saving clause to embrace criminal proceedings. The same rule was announced in *Great Northern Railway Company v. U. S.*, 208 U. S. 267. In these two above cases there had been a change in the substantive law subsequent to the date of the offense, whereas in the instant case the change relates only in the manner of enforcing the punishment. Sec. 5598 of the Revised Statute under the title of Repealed Proi v-sions the Federal Statute provides:

> "All offenses committed and all penalties under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same man-

ner and with the same effect as if said repeal had not been made."

To same effect see also:

Goublin v. U. S., 261 Fed. 5.
De Four v. U. S., 260 Fed. 596.
Goldberg v. U. S., 280 Fed. 728.
Yueas v. U. S., 283 Fed. 20.

There remains only the question of the proper resentence by a member of the superior court of Spokane County, other than the actual trial judge, to be decided upon. (Stipulation). That the district court or superior court retains jurisdiction for the purpose of imposition of proper sentence was clearly established by the Nebraska Supreme Court in *McCormick v. State*, 99 N. W. 237:

> "When the former sentence was set aside by this court and the cause was remanded, the matter then stood before the district court precisely as though no judgment or sentence had ever been pronounced. It was then the duty of that court, irrespective of any order of ours, to announce a legal judgment on the verdict. The district court is one of general and original jurisdiction. It had the power to try the plaintiff on the charge preferred against him and pass such sentence upon him on the verdict of guilty as was provided by law; and we are not prepared to hold that, by its abortive attempt to render a judgment against the plaintiff, its power to pronounce a legal judgment was lost. It seems clear that the power of the court could only be lost or exhausted by pronouncing a valid judgment."

The only remaining question then, is whether, the trial judge, the Honorable Chas. H. Leavy, having resigned as a member of the bench of Spokane County, on December 1, 1936, his successor in office or another judge of the superior

court of Spokane County, Washington, may properly sentence the petitioners. Sound authority seems to hold that this may be done.

This Court, in *Meldrum v. U. S.*, 146 Fed. 390, and the same case in 151 Fed. 324, has held that where stenographic notes are taken of the evidence in a criminal prosecution in a Federal court, and the trial judge dies after a verdict of guilty and while a motion for new trial is pending, his successor may not only deny the motion, but may *render judgment upon the verdict.*

Judge Gilbert, after reference to the Federal statutory provision covering death and disability of the trial judge, after which provision our state statute, Sec. 392, Remington's Revised Statutes, seems to have been modeled, uses this unequivocal language:

> "If the succeeding judge can, as undoubtedly he may under this statute, deny a motion for a new trial, there can be no question of his power to proceed further in the case and render judgment upon the verdict."

This Supreme Court decision follows the general rule found in Sec. 3007, 16 C. J. 1269:

> "As a rule the sentence is pronounced by the court before which the trial was had. Where, however, the jurisdiction of the court is not lost the judge sitting at a regular term thereof may pass sentence, unless prevented by some statutory provision, although the conviction was had at another term and before another judge. Likewise the successor of a trial judge has power to pass sentence upon a prisoner convicted before, but not sentenced by his predecessor in office, although

this power should be limited to supplying the omission of such predecessor."

The Supreme Court of Missouri in *State v. Shea,* 8 S. E. 409, has held to the same rule.

The right of another judge other than the trial judge to pass sentence was recently supported by the Supreme Court of Florida in *Anderson v. State,* 155 So. 726. In that case the court went much further than required in the instant case and held that a judge specially appointed by the governor had authority to impose sentence other than the trial judge.

> "The law is not concerned with the identity of the individual who happens to officiate as judge. It is satisfied if that individual assuming to officiate be clothed by lawful authority in that regard."

In the likewise recent case of *State v. Sweetin,* 8 Pac. (2d) 397, the Supreme Court of Kansas affirms the rule. In this Kansas case the regular judge became ill and unable to preside in court. Because of his illness and absence, a judge *pro tem* was selected to preside at the criminal trial of the defendant charged with murder. The *pro tem* trial judge presided at all proceedings, passed upon a motion for a new trial, courteously retired and left the duty of fixing and pronouncing sentence to the regular judge. It was held that it was competent for the regular judge to pronounce sentence after the judge who tried the case had retired and ceased to function as a *pro tem* judge.

The statutes of the State of Washington relating to

judgments in criminal actions, Sections 2187 to 2224 of Remington's Revised Statutes, carefully designate that the judgment is in the control of the court and not of the judge of the court.

The Supreme Court of the State of Washington in *Hallam v. Tillinghast*, 19 Wash. 23, has said:

> "The identity of the judge is lost in the court, and the court continues, although the term of a judge is ended."

Likewise in *Gunderson v. Cochrane*, 3 Wash. 476, Judge Scott has said:

> " • • • Our statute provides that the party desiring to settle a statement shall apply to the 'court or judge who tried the cause.' It can hardly be supposed that the words 'court' and 'judge' were both intended to refer to the person occupying the bench at the time of the trial, and yet this must be so, if only the judge who sat at the trial can settle the statement. This would be giving no effect to the word 'court.' While the same judge who presided at the trial continues in office, application to settle the facts is always made to him and not to the court. The word 'court' must mean something more than the judge who tried the cause. The judges change but the court continues, and it seems to me the more reasonable interpretation of the language is, that while the same judge remains on the bench, application to settle the facts should be made to him, and where he has been succeeded in office by another, the power to settle the facts rests with, or is retained by, the court, and application should be made to it by some sort of a proceeding, though most likely it could afterwards be pursued to a determination before the judge at chambers. • • • If the judge whose term of office has expired can settle the statement, it must be his duty to do it. It can not, I think, be contended suc-

cessfully that it would be optional with him to act or not in the premises. If so, he could settle a statement in one case and refuse to do so in another, and the party for whom he should refuse to act would have no remedy. No such uncertain state of affairs could have been intended. If the statute does fix the power to settle the statement in the person of the judge who tried the cause, then clearly his successor or the court could not act, and if the person who was the judge can act in one case he must act in all. This would lead to a peculiar condition, * * * ."

In re Newcomb, 56 Wash. 395.
Grossi v. Long, 136 Wash. 133.
Wharton Criminal Law, 10th Ed., Sec. 1941, p. 375.

Further under Sections 464, 465, 466, 467 and 468, Remington's Revised Statutes, it would seem that petitioners had ample remedy in the state court to correct any erroneous sentence, if one were imposed, and the statute allows one year's time for doing the same.

But finally these petitioners were given an opportunity to elect whether they would be sentenced under the old law or the new law previous to the resignation of the trial judge. (*See motion and order to appear for election as to sentence made by the trial judge, the Honorable Chas. H. Leavy, and the affidavit of J. R. McElroy that petitioners did not appear.*)

CONCLUSION

It is respectfully submitted, it appearing that petitioners were duly and properly convicted by a jury of the crime of grand larceny under the statutes of the State of Washington, and that petitioners have shown no disadvantage

in the matter of the sentence imposed, that this Honorable Court should affirm the sentence of these petitioners.

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